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Chan Wei Loon & Anor v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05(M)-234–09 OF 2015
ZAWAWI SALLEH, AHMADI ASNAWI AND KAMARDIN HASHIM JJCA
1 JUNE 2018

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Criminal Law — Dangerous drugs — Trafficking — Whether prosecution not required to prove possession if drug trafficking charge premised on 'manufacturing' of drugs — Whether 'manufacturing' itself was an act of trafficking under s 2 of the Dangerous Drugs Act 1952 — Whether quantity of drugs produced was immaterial where charge of trafficking premised on 'manufacturing' of drugs

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The appellants were convicted and sentenced to death by the High Court on two charges of drug trafficking under the Dangerous Drugs Act 1952. The first charge, committed at a double-storey shop house ('the shop house'), was that they had, with common intention, done an act (ie, carried on the manufacture) for the purpose of trafficking in 20,000.21g of nimetazepam (commonly known as 'Erimin 5 pills'). The second charge was that they had, with common intention, trafficked in 26,543g of the same drug at a double-storey terrace house ('the house'). The first appellant ('A1') had rented both the shop house and the house from their respective owners. Acting on a tip-off, a police party had raided the shop house first wherein they arrested the appellants and found on the ground floor of the premises thousands of Erimin 5 pills and various machinery and materials used in the making of the pills. Altogether, 20,200.21g of nimetazepam were recovered from the premises. Later the same day, another police party raided the house a short distance away and recovered 26,543g of the same drug from various parts of the house. The items seized from the house included a passport and a bank account book belonging to the second appellant ('A2'). When they were called upon by the trial court to make their defence to the charges, both the appellants gave almost identical unsworn written statements from the dock. The appellants claimed that they had only occupied the first floor of the shop house to carry on an alarm and CCTV service business and had nothing to do with the ground floor of the premises which A1 had rented out to his friend to carry on a medicinal supplement manufacturing business. The appellants claimed they were arrested by the raiding police party on the first floor of the shop house and were then taken down to the ground floor after the police broke open a door to gain entry to the ground floor. With regard to the house, the appellants contended that they

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only occupied the master bedroom while two other rooms were occupied by men who were running the medicinal supplement business on the ground floor of the shophouse. The appellants denied any knowledge of the drugs found in the house. In their instant appeal against conviction and sentence, the appellants contended, inter alia, that the trial judge's ruling that the prosecution did not have to prove possession with regard to the first charge was fatal and entitled them to an acquittal as their contention that they had no custody or control of the things found on the ground floor of the shop house was never rebutted. The appellants also argued that the trial judge overlooked the prosecution's failure to discharge its onus of proving that the shop house was not accessible to persons other than the appellants. A2, in particular, submitted that his conviction on the second charge was wrong as it was premised merely on the fact that his passport and bank account book were found in the house.

Held, unanimously dismissing A1's appeal and affirming his conviction and sentence on both charges; dismissing A2's appeal in respect of the first charge but allowing his appeal against conviction and sentence on the second charge and acquitting and discharging him of the same:

(1) The court agreed with A2's submission that his conviction on the second charge was unsustainable because it was based merely upon the finding of his passport and bank account book in the house. Accordingly, his appeal against conviction and sentence on the second charge was allowed and he was acquitted and discharged of that charge (see paras 87–88).

(2) The issue of whether the appellants were arrested on the first floor or the ground floor of the shop house was a matter exclusively within the domain of the trial judge who had the audio-visual advantage of seeing and hearing the relevant witnesses in order to make a definitive finding. The trial judge found as a fact that the appellants were arrested on the ground floor. This court was in no position to disagree with the trial judge unless it could be shown that her finding was perverse or against the weight of the evidence. The trial judge's finding was amply supported by the evidence and she did not err. She had accepted the evidence of the relevant prosecution witnesses whom she found credible. In any case, it was immaterial on which floor the appellants were arrested because A1 had entered into a tenancy agreement in respect of the whole shop house. Hence, he had the care and management of the entire shop house and was in occupation of the same and thereby had custody or control of the articles, appurtenances and apparatus located therein. The evidence adduced by the prosecution was also sufficiently adequate to fasten both the appellants with occupation of the shop house on account of the fact

that both of them had care or management of it (see paras 52–55 & 93).

(3) Possession was not an essential ingredient in a case involving manufacturing of drugs and thus did not need to be proved before the trafficking definition under s 2 of the Dangerous Drugs Act 1952 ('the DDA') was invoked. The trial judge did not err in finding that the prosecution had proven that the appellants were engaged in the manufacturing of the impugned drugs and that 'manufacturing' was itself an act of trafficking under s 2 of the DDA which did not require possession to be proven. The quantity of drugs manufactured was immaterial as the act of trafficking was not dependent on the quantity of drugs that was manufactured. Hence, even if only one gram of dangerous drug was manufactured, it was still trafficking and could attract s 39B of the DDA into motion (see paras 59, 63 & 74–75).

(4) Although there was no eye-witness testimony to establish that the appellants manufactured the impugned drugs, the seizure of the incriminating exhibits, the DNA and finger-print evidence, the seizure of a bunch of keys and scan card from A1which opened all doors to the ground floor of the shop house, and the general scheme of events showed that there was more than sufficient evidence to create the reasonable inference that the appellants had indeed manufactured the said drugs within the definition of s 2 of the DDA. The prosecution had established the nexus between the appellants and the incriminating exhibits and had discharged the onus of proving that the shop house was not accessible to others (see paras 83–84).

(5) The trial judge did not err in finding that A1 had mens rea possession of the drugs found in the house as he was the one who had rented the house and the keys to the house were found on him at the time of his arrest and he was the occupier of the house when the drugs were found by the police (see para 100).

[Bahasa Malaysia summary

Perayu-perayu telah disabitkan dan dijatuhi hukuman mati oleh Mahkamah Tinggi atas dua pertuduhan mengedar dadah di bawah Akta Dadah Berbahaya 1952. Bagi pertuduhan pertama, dilakukan di sebuah rumah kedai dua tingkat ('rumah kedai'), adalah bahawa mereka telah, dengan niat bersama, melakukan suatu perbuatan (iaitu, menjalankan pembuatan itu) bagi tujuan pengedaran 20,000.21g nimetazepam (dikenali sebagai 'Erimin 5 pil'). Pertuduhan kedua adalah bahawa mereka mempunyai niat bersama, mengedarkan 26,543g dadah yang sama di rumah teres dua tingkat ('rumah itu'). Perayu pertama ('A1') telah menyewa kedua-dua kedai dan rumah itu daripada pemilik masing-masing. Bertindak atas maklumat yang diberi, pihak polis telah menyerbu rumah kedai yang pertama di mana mereka menangkap perayu dan menemui di tingkat bawah premis ribuan pil Erimin 5 dan pelbagai mesin dan

A bahan yang digunakan dalam pembuatan pil itu. Secara keseluruhan, 20.200.21g nimetazepam telah ditemui dari premis itu. Pada hari yang sama, satu lagi pihak polis telah menyerbu rumah itu yang jaraknya tidak jauh dan menemui 26,543g dadah yang sama di merata ceruk rumah itu. Item yang disita dari rumah itu termasuklah pasport dan buku akaun bank milik perayu B kedua ('A2'). Apabila mereka dipanggil oleh mahkamah perbicaraan untuk membuat pembelaan mereka terhadap pertuduhan, kedua-dua perayu memberikan kenyataan bertulis tidak bersumpah yang hampir sama dari kandang tertuduh. Perayu-perayu mendakwa bahawa mereka hanya C menduduki tingkat pertama rumah kedai untuk menjalankan perniagaan penggera dan perkhidmatan CCTV dan tidak ada kena-mengena dengan tingkat bawah premis yang A1 telah menyewakan kepada rakannya untuk menjalankan perniagaan membuat perubatan tambahan. Perayu mendakwa mereka telah ditangkap oleh pihak polis yang menyerbu di tingkat pertama D rumah kedai dan kemudian dibawa ke tingkat bawah selepas polis membuka pintu untuk dapat masuk ke tingkat bawah. Berhubung rumah itu, perayu-perayu berpendapat bahawa mereka hanya menduduki bilik tidur utama sementara dua bilik lain dididuduki oleh lelaki yang menjalankan perniagaan perubatan tambahan di tingkat bawah rumah kedai itu. Perayu E menafikan mempunyai sebarang pengetahuan tentang dadah yang ditemui di dalam rumah itu. Dalam rayuan mereka terhadap sabitan dan hukuman, perayu-perayu berpendapat, antara lain, bahawa keputusan hakim perbicaraan bahawa pendakwaan tidak perlu membuktikan milikan berkaitan pertuduhan pertama adalah memudaratkan dan memberi hak kepada mereka untuk F membebaskan diri kerana hujah mereka bahawa mereka tiada jagaan atau kawalan terhadap benda yang ditemui di tingkat bawah rumah kedai itu tidak pernah dicabar. Perayu juga berhujah bahawa hakim perbicaraan telah tidak mengambil kira kegagalan pendakwaan untuk melaksanakan bebannya untuk membuktikan bahawa rumah kedai itu tidak boleh diakses oleh orang selain G daripada perayu. A2, khususnya, berhujah bahawa sabitannya bagi pertuduhan kedua adalah salah kerana ia adalah berasaskan semata-mata kepada fakta bahawa buku pasport dan akaun banknya telah ditemui di dalam rumah itu.

H **Diputuskan**, sebulat suara menolak rayuan A1 dan mengesahkan sabitan dan hukumannya atas kedua-dua pertuduhan itu; menolak rayuan A2 berkenaan dengan pertuduhan pertama tetapi membenarkan rayuannya terhadap sabitan dan hukuman ke atas pertuduhan kedua dan membebaskan dan melepaskannya terhadap pertuduhan itu:

I (1) Mahkamah bersetuju dengan penyerahan A2 bahawa sabitannya terhadap tuduhan kedua adalah tidak mampan kerana ia hanya berdasarkan dapatan pasport dan buku akaun banknya di dalam rumah. Oleh itu, rayuannya terhadap sabitan dan hukuman atas pertuduhan kedua dibenarkan dan dia dibebaskan dan dibebaskan dari pertuduhan itu (lihat perenggan 87–88).

(2) Isu sama ada perayu ditangkap di tingkat pertama atau di tingkat bawah rumah kedai adalah perkara eksklusif dalam domain hakim perbicaraan yang mempunyai kelebihan audio-visual untuk melihat dan mendengar saksi-saksi yang bersangkutan untuk membuat penemuan pasti. Hakim perbicaraan didapati sebagai fakta bahawa perayu ditangkap di tingkat bawah. Mahkamah ini tidak mempunyai kedudukan untuk tidak bersetuju dengan hakim perbicaraan melainkan jika dapat ditunjukkan bahawa temuannya adalah jahat atau menentang berat bukti. Tinjauan hakim perbicaraan telah banyak disokong oleh bukti dan dia tidak sesat. Dia telah menerima keterangan saksi-saksi pendakwaan yang relevan yang dia dapati berwibawa. Walau bagaimanapun, adalah tidak penting di mana lantai perayu ditangkap kerana A1 telah menandatangani perjanjian penyewaan berkenaan keseluruhan rumah kedai itu. Justeru, dia menjaga dan mengurus seluruh rumah kedai itu dan mempunyai jagaan atau kawalan terhadap artikel, *appurtenances* dan *aparatus* yang terletak di dalamnya. Keterangan yang dikemukakan oleh pendakwaan juga mencukupi untuk mengikat kedua-dua perayu dengan pendudukan rumah kedai itu kerana fakta bahawa kedua-dua mereka telah menjaga atau menguruskannya (lihat perenggan 52–55 & 93).

(3) Milikan bukan elemen penting dalam kes yang melibatkan pembuatan dadah dan oleh itu tidak perlu dibuktikan sebelum definisi pengedaran di bawah s 2 Akta Dadah Berbahaya 1952 ('ADB') digunakan. Hakim perbicaraan itu tidak terkhilaf apabila mendapati pendakwaan telah membuktikan bahawa perayu terlibat dalam pembuatan dadah yang dipersoalkan dan 'pembuatan' itu sendiri adalah suatu perbuatan pengedaran di bawah s 2 ADB yang tidak memerlukan milikan dibuktikan. Kuantiti dadah yang dibuat adalah tidak penting kerana perbuatan pengedaran tidak bergantung kepada kuantiti dadah yang dibuat. Oleh itu, walaupun hanya satu gram dadah berbahaya yang dibuat, ia masih mengedar dan boleh menarik s 39B ADB (lihat perenggan 59, 63 & 74–75).

(4) Walaupun tidak ada keterangan saksi untuk membuktikan bahawa perayu yang telah membuat dadah yang dipersoalkan, penyitaan ekshibit yang menunjukan bersalah, bukti DNA dan bukti cap jari, penyitaan segugus kunci dan kad imbasan daripada A1 yang membuka semua pintu kepada tingkat bawah rumah kedai, dan skim kejadian amnya bahawa terdapat lebih banyak bukti yang mencukupi untuk membuat kesimpulan yang munasabah bahawa perayu-perayu sebenarnya telah membuat dadah tersebut menurut definisi s 2 ADB. Pendakwaan telah membuktikan kaitan antara perayu dan ekshibit yang menunjukkan bersalah dan telah melepaskan beban untuk membuktikan bahawa rumah kedai itu tidak dapat diakses oleh orang lain (lihat perenggan 83–84).

(5) Hakim perbicaraan tidak terkhilaf kerana mendapati A1 mempunyai mens rea milikan dadah yang ditemui dalam rumah itu kerana dia adalah orang yang menyewa rumah itu dan kunci kepada rumah itu ditemui padanya semasa dia ditangkap dan dia adalah penghuni rumah itu apabila dadah tersebut ditemui oleh polis (lihat perenggan 100).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 886–1075.

Cases referred to

Jeffrey Scott Weimar, Appellant v The State of Oklahoma, Appallee 1976 OK CR 285, CA (refd)
Lee Boon Siah & Ors v PP and other appeals [2014] 2 MLJ 652; [2014] 3 CLJ 585, CA (refd)
Pendakwa Raya lwn Lim Hung Wang dan lain-lain [2012] 9 MLJ 797; [2012] 1 LNS 368, HC (refd)
Pendakwa Raya v Mansur bin Mohd Rashid v Anor [1996] 3 MLJ 560, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Criminal Procedure Code s 112(5)
Dangerous Drugs Act 1952 ss 2, 37(b), (d), (da), 37D, 39B, First Schedule
Evidence Act 1950 ss 8, 9, 32(1)(i)

Appeal from: Criminal Trial Nos 45–7 of 2011 and 45–8 of 2011 (High Court, Seremban)

Kitson Foong (Chew Jee San and Jodia Poh with him) (Kit & Assoc) for the first appellant.
Ramkarpal Singh (Harshan Zamani with him) (Karpal Singh & Co) for the second appellant.
Samihah Razali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] Both the appellants were sentenced to suffer the death penalty by the court below upon their convictions in respect of the following charges:

Tuduhan Pertama (Pindaan):

Bahawa kamu pada 23hb Oktober 2010, di premis rumah kedai Lot 185, Jalan Haruan 5, 5/6, Pusat Komersial Oakland II, di dalam Daerah Seremban, di dalam

Negeri Sembilan, dengan niat bersama telah melakukan perbuatan bagi tujuan mengedar dadah berbahaya iaitu Nimetazepam seberat 20,000.21 gram dan dengan itu melakukan suatu kesalahan di bawah seksyen 39B(1)(c) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah s 39B(2) Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Kedua:

Bahawa kamu pada 23hb Oktober 2010, lebih kurang jam 2.15 petang, di rumah No 861, Jalan S2 D23, City Homes di dalam Daerah Seremban, di dalam Negeri Sembilan dengan niat bersama telah mengedar dadah berbahaya iaitu Nimetazepam seberat 26,543 gram dan dengan itu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(b) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama dibaca bersama dengan seksyen 34 Kanun Keseksaan.

[2] Being dissatisfied with the impugned decision, both the appellants appealed to this court. Hence these appeals before us.

[3] We had heard the parties and perused the evidence on record. We found no merits in both appeals and dismissed the same. We now give the detailed reasons for our decision.

THE CASE FOR THE PROSECUTION

The first charge

[4] Acting upon information received, in the early hours of 23 October 2010, SP14 (ASP Nik Ezanee bin Mohd Faizal) with a team of police officers, raided a two storey shop house at No 185, Jalan Haruan 5/6, Kawasan Komersil Oakland, Seremban ('the said shop house'). He divided his men into four teams wherein he headed the first team; Insp Basri bin Husin (SP33) led the second team; SI Halim headed the third team; and Sjn Mustapha was head of the fourth team. Each of the teams were assigned with specific roles.

[5] Upon arrival at the said shop house, the teams took their respective positions assigned to them. SP14 and his group positioned themselves at about 20 meters away from the said premises, facing the front portion of the said shop house.

[6] At about 8.50am, SP14 saw a black coloured KIA motorcar bearing the registration No NBM 3614 stopping in front of the said shop house. Both the driver and the sole passenger of the said car exited the car and walked towards the said shop house. He identified the first appellant as the driver of the said car. The first appellant was wearing glasses and had a sling bag slung across his

shoulders. SP14 further identified the second appellant as the passenger of the car, who was earlier seated at the front passenger seat, next to the first appellant.

[7] The said shop house was rented out to the first appellant by its owner, SP12 (Harendran a/l Perisamy), for a period of one year commencing from 26 June 2010 vide tenancy agreement (exh P129) shown at pp 225–234 of *Jld* 3B, *RR*. There was an express prohibition (vide cl 2.7) against subletting, assigning, or part with the legal or actual possession of the said premises or any part thereof to any person or persons except with the prior consent in writing of the landlord (SP12).

[8] SP14 saw the second appellant opening the door of the said shop house whereupon both the appellants then entered the premises. About 15 minutes later, both the appellants emerged from the premises and proceeded to pray at the praying altar, located in front of the premises. After they were done, both went back inside the said premises.

[9] The raiding team sprang into action at about 9.30am two members from SP14's team broke opened the front door of the said shop house and another team proceeded to forcefully enter from the rear door of the said premises. When SP14 and his team rushed into the said shop house, both the appellants ran towards him and his team. It resulted in the arrest of both the appellants in no time.

[10] The premises is a double storey shop house. Both the appellants were arrested by SP14 and his team on the ground floor. The floor plan is exh P127 at pp 218 of *Jld* 3B *RR* ('RR').

[11] SP14 and his team thoroughly examined the said shop house. On the ground floor, he found various types of machines and substance suspected of being used to manufacture illicit drugs and also substance suspected to be drugs in several black coloured plastic bags (see its location as drawn in the floor plan at pp 219–223 of exh P127).

[12] The complete list of machines, powdery substance and other related items seized from both the appellants by SP14 were as itemised in the search list, exh P181, for the first appellant (at pp 253–259, *Jld* 3B, *RR*) and search list, exh P182, for the second appellant (at pp 260–267 of the same *Jld*).

[13] On 25 October 2010, at about 10.50am, the chemist, Dr Vanitha a/p Kunalan ('SP6') visited the said shop house and examined the machines and the various types of substance found therein at the request of the police. At the end of the examination and analysis, she found that the said shop house had been used to process and manufacture 'Eramin 5' pills.

[14] The items found by SP6 were listed by the learned trial judge at pp 30–34 of *Jld* 1, *RR*, as follows:

[20] SP6 mengesahkan:

(a) Terdapatnya serbuk 'Nimatezepam' di tempat-tempat berikut:

(i) Mesin di ruang tengah premis eksibit P16; dan

(ii) Mesin ketuhar di ruang belakang premis (eksibit P20A);

(b) Bahan-bahan kimia yang diperlukan bagi penghasilan pil tersebut, iaitu:

(i) Cellulose di bahagian tengah premis (eksibit B6A dan B7A);

(ii) Starch (kanji) di bahagian belakang premis (eksibit P162);

(iii) Aspartame di bahagian tengah premis (eksibit P148E);

(iv) Mentol di bahagian ruang tengah premis (eksibit P151A);

(v) Lactose di mesin bahagian ruang tengah premis (eksibit P16);

(vi) Magnesium strearate di bahagian tengah ruang premis (eksibit P152);

(vii) Hydropopylmethyl cellulose di bahagian belakang premis (eksibit P160A dan P161A); dan

(viii) Ethanol di bahagian tengah ruang premis (eksibit P154E).

(c) Pewarna yang telah digunakan untuk penghasilan tablet berwarna oren. Warna oren ini adalah campuran tiga jenis warna, iaitu:

(i) Erythrozines di bahagian tengah ruang premis (eksibit P148G);

(ii) Tartrazine di bahagian tengah ruang premis (eksibit P147B dan P147C); dan

(iii) Ponceau 4R di bahagian tengah ruang premis (eksibit P148H);

(d) Terdapat mesin-mesin yang digunakan dalam penghasilan tablet ini untuk menghasilkan serbuk berwarna oren. Mesin-mesin tersebut adalah seperti berikut:

(i) Mesin di ruang tengah (eksibit P16) bertanda B1 dalam rajah kasar (eksibit P127).
Mengikut SP-6, mesin ini digunakan untuk mencampurkan dan mengaulkan bahan-bahan ramuan iaitu Nimatezepam, Lactose, Magnesium, Strearate, Cellulose, Menthol, Hydropylmethl Cellulose, Starch, Aspartame dan 3 pewarna iaitu Tartrzine, Poncean 4R dan Erythrozine.

(ii) Mesin di ruang hadapan premis (eksibit P14) (bertanda A1 dalam rajah kasar).
Mesin ini digunakan selepas mengeluarkan 'dough' daripada mesin B1. Mesin ini berfungsi sebagai pembentuk untuk mengeluarkan bahan dan serbuk berwarna oren daripada 'dough' tersebut.

(iii) Oven di bahagian belakang premis (eksibit P20A dan P20B). Hasil daripada serbuk oren ini akan dimasukkan ke dalam oven (eksibit P20A dan P20B) menggunakan tray-tray dalam oven tersebut bagi tujuan pengeringan (dalam gambar 40 hingga 43 (eksibit P5).

(iv) Mesin pengayak di bahagian tengah premis (eksibit B17). Bahan yang dikeringkan tadi ini akan dimasukkan ke dalam mesin pengayak (gambar 28 hingga 29 (eksibit P5)). Tujuannya adalah untuk mengasingkan ketulan dan serbuk berwarna oren. Jadi yang keluar daripada mesin ini adalah serbuk warna oren yang halus.

(v) Mesin di ruang hadapan premis (tandaan A2) (eksibit P14). Serbuk halus berwarna oren ini akan dimasukkan ke dalam mesin bagi membentuk pil-pil yang berwarna oren. Pil-pil berwarna oren ini mempunyai logo yang sama dengan acuan 'tableting' mesin ini.

(vi) Mesin di bahagian hadapan premis (bertanda C8 eksibit P18). Mesin digunakan untuk memasukkan pil-pil berwarna oren itu ke dalam kepingan aluminium (gambar 34 (eksibit P5) (eksibit P27a dan P27b) bagi tujuan pembungkusan.

[21] Selepas memeriksa mesin-mesin dan menganalisa bahan- bahan yang ditemui, SP-6 telah menyediakan Laporan Kimia, eksibit P24.

[15] Mohd Helmi bin Rasdi (SP4), an assistant mechanical engineer attached with JKR Cawangan Mekanikal, Negeri Sembilan, was also asked by the police to certify the serviceability/operability of the above-said machines.

[16] SP4 found the machines he had examined, namely:

(a) machines marked A1 and A2 (exh P14) as shown in photographs No 19, 21 and 22 (exh P5) at the front portion of the shop house;

(b) machine marked (exh P16) shown at photographs No 25 and 26 of exh P5 and the machine marked B5 (exh P17) shown at photograph No 30 of exh P5 at the middle portion of the said shop house; and

(c) one machine comprising of two ovens (exhs P20A and P20B) and one set of compressor as shown in photographs No 30, 33, 34, 37 and 38 of exh P5, at the rear portion of the said shop house, were all in good condition, serviceable and could be operated upon.

[17] SP14 also seized thousands of orange coloured pills from various places inside the said shop house (on the ground floor) in which he later handed them over to the investigating officer, Insp Juliana bt Kassim (SP40). The latter eventually re-marked the exhibits with the markings J1, J2(i), J2(ii), J2(iii),

J2(iv), J2(v), J2(vi), J2(vii) J2(viii), J2(ix), J2(x) and J2(ix). In court the exhibits were marked as P61A, P62, P64A, P65A, P66B, P67A, P68A, P69A, P70A, P72A and P73A respectively.

[18] SP6 analysed the said exhibits and found them to contain 20,000.21g of nimetazepam, the subject matter of the first amended charge. Her report is exh P63, evinced at pp 173–175 of *Jld* 3A, *RR* ('the said drugs'). SP6 also confirmed that nimetazepam is a scheduled drug under the First Schedule of the Dangerous Drugs Act 1952 ('the DDA').

[19] At the end of the prosecution's case, the learned trial judge found that the prosecution had established a prima facie case against both the appellants in respect of the first amended charge and both the appellants were ordered to enter their defence.

The second charge

[20] On the same day (23 October 2010), at about 2pm, SP33 together with SP34 (D/Corp Sarbani bin Abdullah) and four other officers raided house No 861, Jalan S2 D23, Garden City Homes, Seremban 2, Negeri Sembilan ('the said house') upon SP14's instruction.

[21] The said house was purportedly rented out by the first appellant commencing from 1 June 2010, from its owner through the services of a housing agent (SP37) vide tenancy agreement, exh P207, shown at pp 312–320, *Jld* 3B, *RR* SP38, who was SP37's assistant confirmed that he had taken the first appellant to visit the said house prior to the signing of the tenancy agreement by the landlord and the first appellant. SP38 also confirmed that he had handed the keys of the said house to the first appellant. Both SP37 and SP38 identified the first appellant as the tenant of the said house at the material time of the police raid.

[22] The first appellant was brought along to the said house in the said raid.

[23] The said house is a double storey terrace house. It took about 15 minutes for SP33 and his party to reach the said house from the said shop house that was earlier raided by SP14.

[24] SP33 found the front door of the said house locked. He used the keys retrieved from the first appellant's front right trousers pocket to open the said door. Once opened, SP33 entered the said house together with the first appellant and members of his team.

[25] The front door led SP33 and his party to the main hall ('ruang tamu'). At the main hall, SP33 saw and subsequently seized the following exhibits:

(a) one blue drum ('tong') (marked A, exh P189) containing a transparent plastic packet which further contained white powdery substance ('serbuk putih') (exh P189A);

(b) one blue drum (marked A1, exh P190) containing a transparent plastic packet which further contained white powdery substance (exh P190A);

(c) one blue drum (marked A2, exh P191) containing white powdery substance (exh P191A); and

(d) one blue coloured box (marked A3, exh P192) containing 20 pieces of plastic containers (marked A3a, exhs P193, P194A to P194T).

These exhibits were found at the location marked X in the sketch plan (see exh P195 at pp 282 and 285, *Jld* 3B, *RR*).

[26] In a room located on the same (ground) floor of the said house, SP33 found and seized a luggage bearing the brand of 'World Proof Polo King' (exh P197). Inside the said luggage were six plastic packets containing substance suspected to be drugs.

[27] In the master bedroom located on the upper (first) floor of the said house, SP3 seized a green pail (exh P85). Inside the pail was a small bottle written with the word 'Bird Nest' (exh P85A) containing 348 pieces of Eramin 5 pills (exh P85B).

[28] SP33 also found and arrested a Vietnamese woman (Nguyen Thi Thu Trang), then lying down on a mattress in the master bedroom. Investigations revealed that she was a GRO at one of the night spots in town and was taken home by the first appellant for a little bit of fun, we surmised.

[29] There were several cloths seized from the said house. In addition, an Astro bill in the first appellant's name (exh P237) and the second appellant's passport (exh P241) and bank account book (exh P242) were seized from the said house.

[30] The exhibits and the Vietnamese woman were subsequently brought back to IPD, Seremban and handed over to SP47 (Insp Mohd Airul Shukri @ Remy bin Saini), the investigating officer in respect of these seizures from the said house.

[31] SP47 subsequently re-marked the six packets of suspected drug exhibits recovered from the luggage exh P197 with the markings R26, R27, R28, R29,

R30 and R31 respectively. In court the said exhibits were marked as exhs P83A, P83B, P83C, P84A, P84B and P84C. The same exhibits and the bottle, marked R32A (exh P85) containing 348 pieces of Eramin 5 pills (exh P85B) were sent to the chemist, SP6, to identify the nature, contents and weight of the said substances.

[32] SP6 analysed the said exhibits and found them to contain 26,543g of nimetazepam, the subject matter of the second charge. Her report is exh P82, shown at pp 188–189 of *Jld* 3A, *RR*.

[33] At the time of the commencement of the trial against both the appellants, the Vietnamese woman could no longer be found. Her whereabouts was unknown. The learned trial judge consequently allowed the prosecution's application to admit the Vietnamese woman's statement recorded under s 112(5) of the Criminal Procedure Code in evidence under s 32(1)(i) of the Evidence Act 1950. Her Ladyship's reasons in allowing so were set out in her grounds of judgment at paras 68–70 and 74, pp 65–72, *Jld* 1, *RR*. We were with her and could find no error to invalidate the admission of the said document in evidence, now marked as exh D227, exhibited at pp 392–401, *Jld* 3B, *RR*.

[34] The Vietnamese woman stated in exh D227 that on the night before the incident, she was working as a GRO at Pusat Hiburan Solid Gold, Seremban and had entertained both the appellants until the wee hours of the morning. Finally, she was paid RM300 by the first appellant to sleep with him. Then, she was taken home by the first appellant, with the second appellant tagging along. All the three slept in the same room on the first (upper) floor. There were no other occupants in the said house. She was arrested by the police the next day, still sleeping, in the same room she had slept with the first appellant.

[35] At the end of the prosecution's case, the learned trial judge also found that the prosecution had established a prima facie case against both the appellants in respect of the second charge and both the appellants were ordered to enter their defence.

THE CASE FOR THE DEFENCE

[36] Both the appellants gave an *unsworn written statement* from the dock and their defence appeared strikingly identical.

[37] Both the appellants stated that they were engaged in providing alarm and CCTV service business at the said shop house.

A **[38]** The first appellant further stated that he had entered into a tenancy agreement to rent the said double storey shop house. However, he had sublet the ground floor of the shop house to his old acquaintance, one Ah Gu. Hence, he had only occupied the upper (first) floor to run his business with the second appellant.

B

[39] The said Ah Gu had earlier examined the ground floor of the shop house where he had come with Ah Kam and Ah Weng before agreeing to rent the ground floor from the first appellant.

C

[40] Thereupon, the said Ah Gu and his friends started to move in various types of machines and other related stuffs and accessories to start his business. When queried, Ah Gu told both the appellants that he had wanted to produce 'Ubat Kuat Untuk Lelaki'.

D

[41] Both the appellants stated that they had assisted Ah Gu to carry the machines and other related stuffs and had placed them inside the ground floor of the said shop house and had also been chatting and smoking cigarettes with Ah Gu and his friends therein.

E

[42] The first appellant also offered Ah Gu and Ah Weng to stay with him at the said house (house No 861, City Homes) since there are vacant rooms in the said house. The Vietnamese woman was Ah Gu's girlfriend.

F

[43] Ah Gu and his girlfriend occupied one of the rooms on the upper floor while Ah Weng occupied the room next to Ah Gu's room. Meanwhile the first and second appellants took the master bedroom for themselves.

G **[44]** Both the appellants averred that they have never entered the ground floor portion of the shop house once Ah Gu's business went fully operational. The said portion were closed most of the time and the access card they both had could only open the grille door of the shop house and not the ground floor of the same.

H

[45] Both the appellants claimed that on the day of the incident, both of them were chatting and doing their own thing on the first (upper) floor of the shop house when the police broke opened the door of the first floor and arrested both of them. They insisted that they were arrested on the first floor at
I the shop house before they were taken down to the ground floor.

[46] Both the appellants also insisted that the police had to forcefully break open the door of the ground floor as no keys to open the said door were available from either of the appellants.

[47] When the door was finally forced opened, both the appellants claimed that they saw boxes, drums and powdery substance of unknown origin all over the ground floor. The first appellant claimed that he had told the police that the boxes, drums, machines and powdery substance therein belonged to Ah Gu. However, the police refused to listen.

[48] Both the appellants also denied having any knowledge of the drugs seized by SP33 and his team at house No 861, City Homes, the alleged crime scene involving the second charge.

[49] At the end of the defence's case, the learned trial judge found that both the appellants had failed to raise any reasonable doubt in the prosecution's case and had also failed to rebut the presumption under s 37(b) of the DDA invoked against them in both the charges on the balance of probabilities. Both the appellants were eventually found guilty of both the charges and were sentenced to death on both counts.

GROUNDS OF APPEAL

[50] As against these backdrops, both the appellants anchored their appeals on the following grounds:

The second appellant's grounds:

(a) the learned trial judge erred in fact and in law when she found that both the appellants were arrested at the ground floor when in fact both were arrested in their office on the first floor of the shop house minding their own business;

(b) the learned trial judge erred in fact and in law when she failed to make an affirmative finding of possession of the said drugs by both the appellants in respect of the first charge, being an essential ingredient of the said offence;

(c) the learned trial judge had failed to consider that the prosecution had failed to discharge the onus to exclude access into the shop house by others; and

(d) the learned trial judge erred in convicting the second appellant in respect of the second charge premised only upon the presence of the second appellant's passport and bank account book in the said house.

The first appellant's grounds:

(a) the learned trial judge had misdirected herself in concluding that it was not necessary for the prosecution to prove possession in respect of the first charge; and

(b) the learned trial judge in her decision at the close of the prosecution's case had invoked the presumption under 's 37D' of the DDA in respect of both the charges but there were no findings whether both the appellants had rebutted the said presumption at the end of the defence's case. The learned trial judge also found that both the appellants had mens rea possession of the drugs found in the house in respect of the second charge. In addition, in her grounds of judgment, she had omitted any mention of the presumption under 's 37D' being invoked against both the appellants. Instead, she now invoked the presumption under s 37(b) of the DDA. These had prejudiced the defence to no end.

OUR DECISION

Ground (i) (second appellant) — Both the appellants were arrested on the first floor

[51] Learned counsel submitted that both the appellants were arrested on the first floor where they had run their own business, servicing alarm and CCTV machines. It was further submitted that the first appellant had sublet the entire ground floor to Ah Gu. Both the appellants had assisted Ah Gu and Ah Weng to carry the machines into the ground floor area of the said shop house. This would account for the presence of both the appellant's fingerprints and DNA profiles on some of the machines. Both the appellants had also chatted and smoked cigarettes with Ah Gu and Ah Weng. This would account for the presence of cigarette butts carrying the DNA profiles of both the appellants. In addition, the evidence of the cook next door, SP2, does not dismissed the possibility that the manufacturing was done by others. It was finally submitted that in such event and as both the appellants were arrested upstairs on the first floor, hence, the machines and other related stuff located/found on the ground floor were not in the custody or control of both the appellants.

[52] We are of the view that the issue of whether both the appellants were arrested on the first floor or ground floor is a matter within the exclusive domain of the trier of fact, ie the trial judge, who had the audio visual advantage of seeing and hearing the relevant witnesses testifying before him to assist him to come to a definitive finding. The findings by the trier fact, therefore, ought to be given its outmost respect and is not to be taken lightly.

[53] In the event, the learned trial judge found that both the appellants were arrested on the ground floor of the said shop house. We are in no position to disagree with her unless it can be shown that her findings is perversed or was against the grain/weight of the evidence adduced. We have scrutinised the evidence of the relevant witnesses, in particular SP14, SP31, SP32 and SP33

and are satisfied that the learned trial judge had not committed any error of the facts warranting our intervention. Her finding in respect of the same was amply supported by the evidence.

[54] In addition, the learned trial judge had accepted the evidence of SP14, SP31, SP32 and SP33, all of whom had consistently testified that both the appellants were arrested at the ground floor. Again, we have no reason to negate her finding based upon her reliance on the credibility of the testimonies of the said witnesses. The issue of the credit worthiness of SP14 and the others are best left to the fair judgment of the learned trial judge.

[55] Further, in our views it is immaterial whether both the appellants were arrested on the ground floor or on the first floor on account that the tenancy agreement entered by the first appellant was in respect of the entire shop house, comprising of both the ground and first floor. Hence, for all intents and purposes, the first appellant was having the care and management of the said shop house in its entirety. In a nutshell, he was in occupation of the entire shop house, thereby having custody or control of the articles, appurtenances and apparatus located therein.

[56] The fact that both the appellants had their own registered business entity on the first floor going by the trade name of 'Viewty Smart Tech Enterprise', as indicated at pp 104–105 of *Jld* 3A, *RR*, further fortified the factum of both the appellants' care and management of the entire shop house.

Ground (ii) (second appellant); Ground (i) (first appellant) — no affirmative finding of possession of the said drugs and Ground (iii) (second appellant) — access by others into the shop house

[57] Grounded upon the seizure of various types of machines, apparatus and chemical materials that can be used to process drugs that was found in the said shop house where both the appellants were arrested, the learned trial judge opined that it is apparent that the said shop house was used as a drug manufacturing factory. Based on the evidence of SP4, SP6 and SP14, the learned trial judge concluded that the premises was used as a laboratory to manufacture/process (*membuat/memproses*) 'Nimatezepam'. To fortify her findings, she relied upon *Lee Boon Siah & Ors v Public Prosecutor and other appeals* [2014] 2 MLJ 652; [2014] 3 CLJ 585, where this court at p 664 (MLJ) lines G–I; p 599 (CLJ) lines A–C, had stated:

> From the evidence that has been presented, in our judgement, the circumstances prevailing at the factory premises at the time in question show that all the accused persons were present there for the purpose of 'manufacturing' methamphetamines. Based on the discovery of numerous apparatus and chemical materials that can be used to process drugs found in the factory where all the five accused persons were

arrested, the factory in question is as a matter of fact a drug manufacturing setting. The discovery of the apparatus and chemical materials support the finding that the said factory was used as a clandestine drug laboratory.

[58] The learned trial judge proceeded to find that based on the condition of the said premises at the time it was raided by SP14, it is apparent that both the appellants had committed an act of direct or actual trafficking of the said drugs.

[59] Learned counsel further brought our attention to the following paragraph of the learned trial judge's grounds of judgment at pp 43–44, *Jld* 1, *RR*:

> [41] ...
>
> ...
>
> Mahkamah memutuskan memandangkan pihak pendakwaan telah membuktikan bahawa kedua-dua OKT tersebut memproses/mengilang dadah maka elemen pemilikan adalah tidak perlu dibuktikan. Mahkamah bersandarkan kepada keputusan *Lee Boon Siah v PP* di mana Mahkamah Rayuan di ms 601 memutuskan seperti berikut:
>
> > [32] For the proper determination of this issue, it must be borne in mind that, as stated in s 2 of the DDA, the term 'manufacture' included numerous and diverse processes or procedures namely making, producing, compounding, assembling, refining or transformation of the offending drugs. For that reason, in our judgment, unlike for example the act of keeping, concealing, storing, transporting and carrying dangerous drugs which constitute 'trafficking' as defined in s 2 of the DDA that involve the requirement of possession, the manufacturing of dangerous drugs as in the present case does not involve possession (see *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Pendakwa Raya v Mansur bin Mohd Rashid & Anor* [1996] 3 MLJ 560). In other words, possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked.

[60] The learned trial judge went on to state:

> [42] Keputusan *Lee Boon Siah* adalah kedudukan undang- undang hari ini iaitu bagi pertuduhan 'manufacturing' pihak pendakwaan tidak perlu membuktikan 'possession' — milikan. Ini adalah kerana s 2 memperuntukkan secara khusus definisi, perkataan 'manufacture' secara khusus iaitu termasuk 'making, producing, compiling and assembling of the drug' tidak seperti perbuatan lain yang didefinisikan sebagai *trafficking*.

[61] Learned counsel submitted that the learned trial judge had seriously misdirected herself in concluding that it was not necessary for the prosecution

to prove possession and that her failure to do so amounted to a misdirection by way of non-direction justifying appellate intervention.

[62] It was further submitted that the Court of Appeal in *Lee Boon Siah & Ors v Public Prosecutor and other appeals* did not consider in depth the law on cases involving drug manufacturing. It was also submitted that para 32 of *Lee Boon Siah & Ors v Public Prosecutor and other appeals*, (reproduced at para 59 above), which was relied by the learned trial judge, was wrongly decided. It did not provide reasons why possession need not be proven in a drug manufacturing setting. Further, it was submitted that the Court of Appeal was wrong to rely on *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 and *Pendakwa Raya v Mansur bin Mohd Rashid v Anor* [1996] 3 MLJ 560 in concluding that possession of the drugs need not be proven in cases involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked because these two cases are not cases relating to manufacturing of drugs but cases that concerned selling of drugs. Thus, on account that the learned trial judge did not make any affirmative finding of possession of the impugned drugs, the Court of Appeal cannot now step into the shoes of the learned trial judge to make its own finding on possession.

[63] In all the circumstances of the case though, the statement stated at para 32 of *Lee Boon Siah & Ors v Public Prosecutor and other appeals* represents the correct proposition of the law relating to cases involving drug manufacturing. Hence, the learned trial judge did not commit any error of law when she ruled that the ruling in *Lee Boon Siah & Ors v Public Prosecutor and other appeals* applied unequivocally to the facts of the present case.

[64] It is very important to note that in this instant appeal, the case for the prosecution was not based on custody or control thereby invoking the notion of mens rea possession of the said drugs or attracting the presumption of possession and knowledge under s 37(d) of the DDA or invoking the presumption of trafficking under s 37(da) of the same Act. Rather, the prosecution founded its case of trafficking of the said drugs on 'manufacturing', one of the acts that constitute trafficking within the definition of s 2 of the DDA.

[65] The definition of trafficking under s 2 of the DDA is very wide. The section provides:

> 'Trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs otherwise than under the authority of this Act or the regulations made under the Act.

[66] As decided by high authority, most of these acts, other than buying, selling, manufacturing and supplying would invariably involve the essential element of possession of the dangerous drugs — see for instance *Pendakwa Raya v Mansor bin Mohd Rashid & Anor; Lee Boon Siah & Ors v Public Prosecutor and other appeals*.

[67] In our judgment, for the reasons enumerated below, the act of manufacturing dangerous drug is one of those acts of trafficking where the element of possession of the drugs would assumed little relevance or no relevance at all.

[68] In *Pendakwa Raya lwn Lim Hung Wang dan lain-lain* [2012] 9 MLJ 797; [2012] 1 LNS 368, Mohd Zawawi Salleh J, (as he then was) picked the following from *Jeffrey Scott Weimar, Appellant v The State of Oklahoma, Appallee* 1976 OK CR 285 Court of Criminal Appeals of Oklahoma:

> (c) Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears or when they are specifically defined by statute.
>
> 'Manufacture' in its ordinary sense, involves the making of products by hand or machinery' — per Black's Law Dictionary (5th Ed, 1979).
>
> (d) *USA v William MaClaud* 86-00154-02; [1986] UD Dist Lexis 24488, menyatakan:
>
> 'The attempt to manufacture the drug charged requires proof of a series of overt acts constituting substantial steps towards accomplishing the manufacture of methamphetamine'.

[69] In addition, the *Concise Oxford English Dictionary* (12th Ed), provides the meaning of manufacture as:

> Manufacture as:
>
> v. 1 make (something) on a large scale using machinery. 2 (of a living thing) produce (a substance naturally). 3 Make or produce (something abstract) in a merely mechanical way. 4 invent or fabricate (evidence or a story). > n. the process of manufacturing.

[70] Section 2 of the DDA also provides that the word 'manufacture' in relation to a dangerous drugs, includes:

(a) the making, producing, compounding and assembling of the drug;

(b) the making, producing, compounding and assembling a preparation of the drug;

(c) the refining or transformation of the drug into another dangerous drug; and

(d) any process done in the course of the foregoing activities.

[71] By its plain and ordinary meaning of 'manufacture' or 'manufacturing' given by renowned dictionaries and by the DDA itself as enumerated above, it appears to us that in essence, it is all about the doing of an act, action, state or occurrence, more specifically the doing or the making of something whether manually or by machines. Hence, in the context of s 2 of the DDA, what needs to be proven is the making, producing, compounding and assembling of the drug or a preparation of the drug or refining or transformation of the drug into another dangerous drug or any other process done in the course of the foregoing activities. In such event, happening or occurrence, there is no requirement to prove possession of the impugned drugs as the process of making or producing, etc in itself had excluded the element of possession of the same.

[72] What is of paramount importance is the act or process of making or producing or compounding, etc, of the said drugs and its resultant product. The said processes itself as testified by SP6, involved several procedures before its final product is crystallised. Hence, it seems to us that it is embedded in the very definition of 'manufacture' or 'manufacturing' itself that the appellant must have the physical ability and technical capacity, to make or produce or assemble, etc, the said drugs.

[73] It follows that it is then incumbent to prove that both the appellants possessed any or all the chemicals and equipments necessary to manufacture the said drugs and that the evidence at the trial was sufficient to create a reasonable inference that the appellants had manufactured the said drugs within the definition of s 2 of the DDA. It goes without saying that the appellants could not have manufactured the said drugs without the relevant chemicals and necessary equipments and apparatus.

[74] The quantity of the drugs manufactured is also immaterial as the act is not dependent upon the quantity of drugs that was manufactured. Equally, the quantity of the drugs manufactured would also not trigger any presumptious mechanism pinning down the manufacturer with the complicitous act of trafficking under the DDA. Hence, even if only one gram of dangerous drug is produced, it is still trafficking and could attract s 39B of the DDA into motion.

[75] For all the reasons given, we are of the firmed view that possession is not an essential ingredient in a case involving manufacturing of drugs and thus it need not be proven before the trafficking definition in s 2 of the DDA can be invoked.

[76] A scrutiny of the evidence revealed that both the appellants indeed possessed all the relevant chemicals, machines apparatus and materials to produce the said drugs.

[77] The expert's ('SP6') testimony was uncontroverted and verily went unchallenged that on her visit to the said shop house, she had confirmed and found various types of chemicals necessary to make or produce the said drugs (nimatezepam), to wit cellulose, starch, aspartame, mentol, lactose, magnesium strearate, hydropopylmethyl cellulose and ethanol at various parts of the ground floor of the said shop house. SP6 also explained the usage of these chemicals being the necessary and essential ingredients in the making or production of the said drugs.

[78] SP6 also found three main colouring agents namely erythrozines, tartrazine dan ponceau to produce the colour orange, the colour of the 'Eramin 5' pills.

[79] SP6 also found the presence of Nimatezepam powders on one of the machines (exh P16) at the centre of the ground floor of the said shop house and on one of the oven (exh P20A) at the rear portion of the premises.

[80] In addition, SP6 also found various types of machines at the front, centre and rear portion of the ground floor of the said shop house, necessary to make or produce the said drugs, as enumerated in great detail at para 14(d)(i)–(vi) (above) of this judgment. SP6 also explained the functions of each of the machines in the process of producing or making the said drugs.

[81] The testimony of SP4 is equally of great relevance to show that the various types of machines that he had inspected at the request of the police located on the ground floor of the said shop house were all in good and serviceable condition and could be operated upon (see para 15–16 of this judgment).

[82] Additionally, the uncontroverted evidence of SP14 indicated that he had seized several black coloured plastic bags containing the said drugs at various locations on the ground floor of the said premises which SP6 subsequently found to contain 20,000.21g of nimetazepam.

[83] Of course, there was no eye witness to account that both the appellants were in fact making or producing the said drugs in terms of operating the said machines and the machines churning out the said drugs. However, the salient facts found by the learned trial judge revealed the following:

(i) that the first appellant was the tenant of the said premises wherein the owner, SP12, had rented the same to the first appellant vide exh P129. SP12 had identified the first appellant as the person who had paid the tenancy deposit by cash (exh P128) on 20 June 2010. SP12 also confirmed that the last rental payment made by the first appellant before the police raid was in October 2010;

(ii) SP2 (Meng Li Seng) the owner and chef of Restoren Meng Li, located next door, confirmed that he saw various machines being installed at the said shop house about a month before 23 October 2010. In fact SP2 identified exh P15, shown in photograph No 5 of exh P5, as one of the machines he saw being transported into the shop house;

(iii) SP2 identified both the appellants as the person running about in the said shop house. SP2 also confirmed he had smelt the mint flavouring odour seeping from within the said shop house;

(iv) SP3 (Yahya bin Zakaria, Penolong Pendaftar Perniagaan, Suruhanjaya Syarikat Malaysia) confirmed that the trade name 'Viewing Smart Tech Enterprise' printed on 27 pieces of business cards (exh P141, at pp 235, *Jld* 3B, *RR*) seized by SP14 from the first appellant had carried the first appellant's name and the business address of the said shop house (see exh P12 at p 104–105, *Jld* 3A *RR*);

(v) a bunch of keys (exh P135) and scan card (exh P136) were seized from the first appellant;

(vi) each and every door of the said shop house and main grilled door on the ground floor could be opened using the said bunch of keys (exh P135) and scan card (exh P136) seized from the first appellant. An additional bunch, consisting of 24 pieces of keys seized from the first appellant's house at No 861, could also be used in the said shop house;

(vii) SP40, the investigation officer of the case (Insp Juliana bt Kassim) had seized two books/operating manuals showing/instructing how to operate the machines found in the shop house;

(viii) the huge amount of drugs found inside the said shop house showed that the same were not for the personal consumption of both the appellants;

(ix) the conduct of both the appellants in running towards the police when the said shop house was raided showed that they have knowledge of what they were doing and of the existence of the said drugs inside the premises. These were relevant conducts under s 8 of the Evidence Act 1950, and it is incumbent upon them to explain the same under s 9 of the same Act;

(x) at the time of arrest only the two appellants were in the shop house and the police had to forcibly opened the doors of the said shop house after their repeated warnings were ignored;

(xi) the DNA profiles of the first appellant were found upon four pieces of cigarette butts recovered on the ground floor inside the said shop house and second appellant's DNA on two pieces of the same as testified by the chemist, SP7 (Nor Aidora Saedon); and

(xii) fingerprint impressions were lifted from some of the machines to wit exhs P15, P16, P17 and P20A by SP13 (Sjn Saharuddin bin Mat Sayuti, Pembantu Juru Analisa Seksyen Cap Jari, Makmal Forensik PDRM). SP8 (Ng Sman bin Hj Saring, Penolong Pendaftar Penjenayah, Pusat Pendaftaran Penjenayah, Bukit Aman) confirmed that the said fingerprint impressions on 'lifting card' (J3, J4, J7 and J24) were identical with the second appellant's left fingers, while the impressions on lifting card (J6 and J23) were identical with those of the first appellant's; and

(xiii) in addition, there is an express prohibition against the subletting of any part of the said premises to any third parties without the prior consent of SP12.

[84] From the seizure of the incriminating exhibits (drugs, various types of chemicals and various types of machines with distinct functions) from the ground floor of the said shop house together with the arrest of both the appellants within the vicinity therein and the general scheme of events as enumerated in para 83(i)–(xii) above, we are very firm in our view that there are more than sufficient evidence to create the reasonable inference that both the appellants had indeed manufactured the said drugs within the definition of s 2 of the DDA. There can be no doubt that the prosecution had established the nexus between both the appellants and the drug exhibits, the chemicals, machines and apparatus that were seized from the said shop house as found by the learned trial judge. We are equally satisfied that on the facts and evidence, the prosecution had discharged the onus of excluding access into the shop house by others. In fact there was no evidence to suggest otherwise.

[85] Hence, it follows that we could find no fault in the learned trial judge's findings, as follows (at p 43, *Jld* 1 *RR*), to warrant the exercise of our appellate jurisdiction to intervene:

> [40] Berdasarkan keterangan-keterangan yang dijelaskan iaitu tangkapan kedua-dua OKT di tempat kejadian, penemuan pelbagai peralatan dan bahan-bahan kimia untuk memproses dadah, analisa DNA, rampasan kunci dan keterangan mengikut keadaan yang wujud, Mahkamah memutuskan kedua-dua OKT adalah terlibat dalam perbuatan memproses dadah di premis yang dijadikan sebagai makmal/kilang memproses dadah.

[41] Berdasarkan kesemua fakta yang telah dinyatakan, mahkamah boleh membuat kesimpulan bahawa kedua-dua OKT mempunyai pengetahuan dan terlibat di dalam kegiatan memproses dadah berdasarkan mereka ditangkap semasa berada di premis tempat kejadian yang mempunyai peralatan dan bahan-bahan memproses dadah 'Nimatezepam'. Mahkamah memutuskan memandangkan pihak pendakwaan telah membuktikan bahawa kedua-dua OKT tersebut memproses/mengilang dadah maka elemen pemilikan adalah tidak perlu dibuktikan ...

[86] We hasten to add that there is nothing in the judgment of the Court of Appeal in *Lee Boon Siah & Ors v Public Prosecutor and other appeals* that the court had relied upon *Public Prosecutor v Chia Leong Foo* and *Pendakwa Raya v Mansur bin Mohd Rashid & Anor* in concluding that possession of the impugned drugs need not be proven in a case involving 'manufacturing' before the trafficking definition in s 2 of the DDA can be invoked. Rather, we opined that the two cases were cited to illustrate the point that in some situation, to wit like selling or buying drugs, the law does not require the prosecution to prove the element of possession before the trafficking definition under the DDA could be invoked.

Ground (iv) (second appellant) — The second appellant's conviction in respect of the second charge

[87] Learned counsel for the second appellant submitted that the conviction of the second appellant in relation to the second charge is clearly unsustainable on account that it was based merely upon the presence of the second appellant's passport and bank account book in the said house.

[88] We are entirely with him based upon the evidence adduced. Hence, we allowed thesecond appellant's appeal in respect of his conviction pertaining to the second charge. He is thus acquitted and discharged of the second charge without more.

Ground (ii) (first appellant) — Invocation of the presumption under 's 37D' of the DDA by learned trial judge

[89] Learned counsel for the first appellant submitted that:

(i) at the end of the case for the prosecution, the learned trial judge invoked the presumption under 's 37D' of the DDA in respect of both charges (see para 8, p 1541, *Jld* 2H, *RR*) but there is no finding whether both the appellants had rebutted the said presumption at the end of the defence's case;

(ii) in her grounds of judgment, the learned judge had omitted any mention of the presumption under 's 37D' being invoked against both the appellants. Instead, she now invoked the presumption under s 37(b) of the DDA (see para 65, p 63, *Jld* 1, *RR*); and

(iii) the learned trial judge has also found that both the appellants had mens rea possession of the drugs found in the said house in respect of the second charge (see para 2, p 1543, *Jld* 2H *RR*).

Learned counsel submitted that these self-contradictory findings had prejudiced the defence to no end.

[90] Learned counsel's complaint in respect of para (i) above, related to the learned trial judge's finding at the end of the prosecution's case. We have scrutinised her finding as found in the notes of evidence in its entirety, in particular para 8 of p 1541, *Jld* 2H *RR*, and are satisfied that the said finding was in respect of only the first charge, ie the offence of manufacturing the said drugs in the said shop house. There can be no doubt that the word 'premis' used many times in the whole context of her finding refers singularly to the said shop house. Paragraph 8, p 1541 stated:

> (8) Berdasarkan keterangan yang dinyatakan mahkamah memutuskan terdapat inference yang kuat bahawa tertuduh adalah penghuni premis dan mempunyai penjagaan dan pengawasan serta pengurusan, 'care' dan 'management' ke atas premis tersebut dan Mahkamah juga mengguna pakai anggapan sek 37D Akta dadah Berbahaya.

[91] From the paragraph above and the preceding paragraphs beginning from p 1539 up to p 1541 of *Jld* 2H, it is clear that the presumption under the said 's 37D' of the DDA was only invoked in respect of the first charge, contrary to learned counsel's submission that it was invoked in both charges.

[92] Be that as it may, there is no such presumption under 's 37D' of the DDA. The said presumption invoked by the learned trial judge does not exist in the DDA. Hence, what was the learned trial judge referring to? However, it is clear that before '... dan mahkamah juga mengguna pakai anggapan s 37D Akta Dadah Berbahaya', the learned trial judge had alluded to the existence of a strong inference that the accused was the occupier (*penghuni*) of the said premises and had the custody (*penjagaan*), supervision (*pengawasan*), management (*pengurusan*) and 'care' and 'management' over the said premises. This is consistent with the position envisaged under s 37(b) of the DDA, which provides:

> 37 In all proceedings under this Act or any regulation made thereunder —
>
> (a) ...

(b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises;

(c) ...

[93] In all the circumstances of the case, it is very probable that the learned trial judge was alluding to the presumption under s 37(b) of the DDA, but somehow went awry along the way. It cannot be the case that she was alluding to a provision of the law that does not exist under the DDA. This appeal, being a continuation process of the proceedings, would permit us to correct the said anomaly under the proviso of s 60(1) of the Courts of Judicature Act 1964. However, we opined that even without recourse to the said presumption under s 37(b) of the DDA, the evidence adduced by the prosecution is sufficiently adequate to fasten both the appellants with the occupation of the said shop house on account that both the appellants have the care or management of the said shop house. In all the circumstances of the case, there is no necessity to invoke the said presumption under s 37(b) of the DDA to prove occupation of the said premises by both the appellants.

[94] In regard to para (ii) of learned counsel's complaint, we reproduce below what was stated by the learned trial judge in para 65, at p 63 of *Jld* 1, *RR*:

> [65] Berdasarkan fakta yang dinyatakan Mahkamah juga mengguna pakai anggapan seksyen 37(b) Akta Dadah Berbahaya di mana OKT-OKT yang ditangkap di premis 861 yang mempunyai care and management ke atas premis tersebut dianggap penghuni premis tersebut.

[95] It is clear that the learned trial judge had invoked the presumption under s 37(b) of the DDA against both the appellant to find that both the appellants were the occupiers of the said house at No 861, Jalan S2 D23, City Homes, Seremban and not in respect of both the said house and shop house as contended by learned counsel. We note that prior to her finding at para 65 above, she had stated earlier in para 64 as follows:

> [64] Berdasarkan fakta-fakta yang telah dinyatakan di perenggan 1 hingga 4 di atas, Mahkamah memutuskan bahawa OKT-1 dan OKT-2 adalah merupakan penghuni-penghuni premis 861 yang mempunyai care and management ke atas premis.

[96] '... Perenggan 1 hingga 4 di atas ...' is in reference to para 63(1)–(4) at pp 61–63 of *Jld* 1, *RR*, where the learned trial judge had therein laid down the basis to find that both the appellants were the occupiers of the said house.

[97] We have scrutinised the said basis and are on all fours with the learned trial judge in respect of the same and her findings made pursuant thereto. The

only rider is that the said findings cannot be true in respect of the second appellant when the entire evidence adduced against him consisted of only his passport and bank account book found in the said house.

[98] In our view, the learned trial judge's finding in para 65 of her grounds of judgment where she had invoked the presumption under s 37(b) of the DDA against the appellants is an exercise in redundancy in view of her findings in para 64 of the same. Nevertheless, it is not fatal on account of the overwhelming evidence that the first appellant was indeed the occupier of the said house in issue.

[99] In regard to para (iii) of learned counsel's complaint, we are of the view that it is only proper and correct for the learned trial judge to come to such a finding that the appellants or rather the first appellant, had mens rea possession of the drugs in the said house. It is a necessary exercise in order to fasten possession of the said drugs upon the first appellant. It does not conflict and is a distinct exercise from the exercise conducted in para (ii) above where its objective or concern is to establish the occupier or occupiers of the said premises.

[100] At the risk of being repetitive, we would reiterate that the evidence adduced by the prosecution, inter alia, showed that the first appellant had entered into a tenancy agreement to rent the said house through the services of SP37; he was given the keys of the said house by SP38; he occupied the said house as per the statement of the Vietnamese women; the keys of the said house was found on him at the time of his arrest; and he was in occupation or was the occupier of the said house when the said drugs was found by the police in the said house. In such event, we firmly opined that the learned trial judge did not err when she found that the appellants or rather, the first appellant had mens rea possession of the drugs found inside the said house.

CONCLUSION

[101] For all the reasons above, we make the following orders:

(a) the first and second appellants' appeals in respect of their convictions and sentences on the first charge are hereby dismissed and the decision of the learned trial judge in respect of the same are affirmed;

(b) the first appellant's appeal in respect of his conviction and sentence on the second charge is hereby dismissed and the decision of the learned trial judge is affirmed; and

(c) the second appellant's appeal in respect of his conviction and sentence on the second charge is allowed. Hence, the decision of the learned trial judge is set aside and the second appellant is acquitted and discharged of the same without more.

Order accordingly.

Reported by Ashok Kumar